Supreme Court, U.S.
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No. —

IN THE
Supreme Court of the United States

PHIL PARKER, WARDEN,
Petitioner

versus

EUGENE WILLIAMS GALL, JR.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. IN PROCEEDINGS UNDER 28 U.S.C. SECTION 2254, SHOULD FINDINGS OF FACT MADE BY THE U.S. DISTRICT COURT THAT ARE CONSISTENT WITH THE STATE COURTS' FINDINGS AND BASED UPON THE STATE COURT RECORD BE REVIEWED BY THE U.S. COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE OR UNDER A *DE NOVO* STANDARD THAT ALLOWS THE U.S. COURT OF APPEALS TO INDEPENDENTLY DETERMINE THE FACTS?

II. DO JACKSON V. VIRGINIA, 443 U.S. 307 (1979), MOORE V. DUCKWORTH, 443 U.S. 713 (1979), AND 28 U.S.C. SECTION 2254, ALLOW THE U.S. COURT OF APPEALS TO INDEPENDENTLY ASSESS AND RE-WEIGH STATE COURT EVIDENCE, TO REJECT STATE COURT DETERMINATIONS OF STATE LAW, AND TO REVIEW CLAIMS NOT PRESENTED TO THE STATE COURTS?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) Eugene Williams Gall, Jr.

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No. __-____

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PETITION FOR WRIT OF CERTIORARI

Comes the Attorney General of the Commonwealth of Kentucky as counsel for Petitioner Phil Parker, Warden, Kentucky State Penitentiary, and petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The petitioner seeks a writ of certiorari to review the published Sixth Circuit panel Opinion in Gall v. Parker, 231 F.3d 265 (6th Cir.)(reh. denied Feb. 2, 2001)(Apx. 1-131) .

The Kentucky Supreme Court upheld Gall's conviction for murder and death sentence based upon an aggravating circumstance of murder during the commission of first degree rape. Gall v. Commonwealth, 607 S.W.2d 97, *cert. denied*, 450 U.S. 989 (1981)(Apx. 230-268). Thereafter, Gall filed a collateral attack motion, and the Kentucky Supreme Court affirmed the denial of that motion: Gall v. Commonwealth, 702 S.W.2d 37, *cert. denied*, 487 U.S. 1010 (1986).

The opinion and judgment of the U.S. District Court dismissing Gall's petition for writ of habeas corpus with prejudice was issued on January 23, 1991. (Apx. 136-187). The U.S. District Court issued an additional opinion when it denied Gall's motion to alter or amend its judgment, on March 19, 1991. (Apx. 188-192).

On August 11, 1994, Gall filed a motion to expand the record of evidence in the U.S. District Court. On September 21,

1994, the U.S. District Court issued an Opinion and Order denying that motion. (Apx.193-200).

JURISDICTION

Pursuant to 28 U.S.C. §1254, the petitioner requests a writ of certiorari regarding the United States Court of Appeals opinion, October 30, 2000, granting federal habeas corpus relief to a state prisoner, by setting aside his capital murder conviction and death sentence and barring his retrial. The petition for rehearing en banc rehearing was denied by that Court on February 2, 2001. This petition is timely pursuant to Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States in pertinent part:

> Nor shall any person be subject for the same offence but put twice in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United states in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ; to be confronted

with the witnesses against him; . . . and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§1 of the Fourteenth Amendment of the Constitution of the United States states in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Title 28 U.S.C. §2254 (prior to 1996 amendment), states in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination after hearing on the merits of the factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or officer or agent thereof were parties, evidenced by written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit - -

> (1) that the merits of the factual dispute were not resolved in State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State

> court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of sufficiency of the evidence to support such factual determination, is produced as provided hereinafter, and the Federal court on consideration of such part of the record as a whole includes such factual determination is not fairly supported by the record:

and in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectfully set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions in paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by clear and convincing evidence the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Eugene Williams Gall, Jr. was convicted of Murder and the aggravating circumstance of murder during the commission of First Degree Rape and sentenced to death. KRS 507.020(1)(a); KRS 532.025(2)(a)2. The Kentucky Supreme Court unanimously affirmed, 607 S.W.2d 97, *cert. denied*, 450 U.S. 989 (1981)(Apx. 230-269). That Court unanimously rejected Gall's collateral attack on the conviction and sentence. 702 S.W.2d 37, *cert. denied*, 478 U.S. 1010 (1986).

Gall filed a habeas corpus petition on July 15, 1986. On April 30, 1987, the U.S. Magistrate recommended that the petition be dismissed. (Apx. 201-229). Gall objected. The U.S. District Court granted Gall's motions for evidentiary hearing, retesting of physical evidence, depositions, and expert witnesses, and subsequently ordered the parties to file additional briefs after the evidence was filed. On January 23, 1991, the U.S. District Court denied the petition. (Apx. 136-187). Gall filed a motion to alter or amend judgment, which was denied March 19, 1991. (Apx. 188-192). Gall appealed from the District Court's judgment denying the writ and dismissing

the petition with prejudice and the order denying his motion to alter or amend judgment to the Sixth Circuit.

On August 11, 1994, Gall filed a motion in the U.S. District Court to expand the record of evidence in his habeas corpus proceeding. The Court denied that motion. (Apx. 193-200). Gall also appealed that order to the Sixth Circuit.

On November 3, 1999, this case was orally argued. On October 30, 2000, the Sixth Circuit by divided vote issued a published opinion finding constitutional errors in the guilt and penalty phases of Gall's trial. In particular, the Court held that the Commonwealth had failed to prove Gall's guilt for the offense of murder beyond a reasonable doubt, although there was little doubt that Gall killed Lisa Jansen, because the Commonwealth's evidence was insufficient to rebut extreme emotional disturbance, which in the opinion of the Sixth Circuit panel majority was the same thing as insanity and extreme emotional disturbance (but not insanity) was a negative element of murder. (231 F.3d at 277; Apx. 2-3).

As the U.S. District Court noted, the evidence that Gall killed twelve-year old Lisa Jansen is overwhelming. (Apx. 137, 151-153, 186). The U.S. District Court (Apx. 138-141) quoted

the Kentucky Supreme Court's summary of the evidence, 607 S.W.2d at 100-101 (Apx. 231-233). *Also see* 231 F.3d at 278-279 (Apx. 4-6).

The evidence pertaining to Gall's mental condition was summarized in the U.S. District Court's opinion. (Apx. 142-145, 153-177).

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE SIXTH CIRCUIT IS FUNDAMENTALLY FLAWED BY DETERMINING FACTS *DE NOVO* FROM THE STATE COURT RECORD AND BY REJECTING FINDINGS OF FACT BY THE STATE COURTS AND U.S. DISTRICT COURT.

The Sixth Circuit's opinion indicates that the district court's findings of fact based on its review of the state court record will be reviewed *de novo*. "District Court findings of fact based on its review of state court records or written decisions received plenary review." (231 F.3d at 283; Apx. 13). The Sixth Circuit panel majority implicitly rejected numerous express and implied findings of fact made by the state courts and by the U.S. District Court, when the Sixth Circuit panel found reversible error occurred and failed to discuss the findings of fact made by the state courts and U.S. District Court.

A. The U.S. Courts of Appeals are in conflict on the proper standard of review when the U.S. District Court supplements state court findings of fact with additional findings in habeas proceedings because some courts apply the clearly erroneous standard whereas other courts apply a *de novo* standard.

The Third and Tenth circuits apply *de novo* or plenary standard of review to findings of fact made by the U.S. District Court based on the state court record. (i.e., when no evidentiary hearing was held regarding the alleged constitutional violation in federal court), and the presumption of correctness regarding state court fact finding does not apply either because the state courts made no finding or made only an inadequate finding regarding the alleged federal constitutional violation or because an exception to the presumption applies. Yohn v. Love, 76 F.3d 508 at 518 (3rd Cir. 1996); Walker v. Gibson, 228 F.3d 1217 at 1225 (10th Cir. 2000); Smallwood v. Gibson, 191 F.3d 1057 at 1065 (10th Cir. 1999). The Eleventh Circuit applies the clearly erroneous standard to findings of fact made by the U.S. District Court based upon the state court record of evidence pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Spanziano v. Singletary, 36 F.3d 1028 at 1032 (11th Cir. 1994); LoConte

v. Dugger, 847 F.2d 745 at 750 (11th Cir. 1988); both citing Anderson v. Bessemer City, 470 U.S. 564 (1985). Other circuits apparently apply the clearly erroneous standard of review to findings of fact made by the U.S. District Court regardless of whether the U.S. District Court based its findings upon a state court record or upon testimony presented in the U.S. District Court. Quisenberry v. Taylor, 162 F.3d 273 at 276 (4th Cir. 1998); Thompson v. Cain, 161 F.3d 802 at 805 (5th Cir. 1998); Beasley v. Johnson, 242 F.3d 248 at 255(5th Cir. 2001); Hanrahan v. Greer, 896 F.2d 241 at 244 (7th Cir. 1990); Stewart v. Peters, 958 F.2d 1379 at 1382 (7th Cir. 1992); Dubria v. Smith, 224 F.3d 995 at 1000 (9th Cir. 2000) (*en banc*); Wright, Miller, Cooper, 17A *Federal Practice and Procedure*, §4268.5.

B. The Sixth Circuit has adopted conflicting standards for review of District Court findings of fact that supplement the findings made by the state courts.

In Gall v. Parker, 231 F.3d at 282 (Apx. 13), the Sixth Circuit held that a *plenary* or *de novo* standard would be applied regarding the district court's findings of fact based on the state court record, citing, Caldwell v. Russell, 181 F.3d 731 at 735 (6th Cir. 1999). However, in other cases, the Sixth Circuit has

applied the clearly erroneous standard with respect to findings of fact made by the U.S. District Court based on the state court record. McQueen v. Scroggy, 99 F.3d 1302 at 1310 and at 1334 (6th Cir. 1996); DeLisle v. Rivers, 161 F.3d 370 at 380 (6th Cir. 1998)(en banc); Carpenter v. Mohr, 163 F.3d 930 at 943 (6th Cir. 1998), revd. on other grounds, *sub nom.* Edwards v. Carpenter, 529 U.S. 446 (2000); Coleman v. Mitchell, 2001 WL 285809 (6th Cir.) (March 6, 2001), at p.*2. The author of the Sixth Circuit's opinion in the Carpenter case is also the author of the Sixth Circuit's opinion in Gall's case. In short, the Sixth Circuit's application of the standard of review regarding findings of fact made by the U.S. District Court based on the state court record is wholly arbitrary.

C. This Court's Opinions in Strickland v. Washington, 466 U.S. 668 at 698 (1984), and Anderson v. Bessemer City, 470 U.S. 564 (1985), require that the clearly erroneous standard be applied to findings of fact by the U.S. District Court even when based upon the state court record.

In Strickland v. Washington, 466 U.S. 668 at 698 (1984), this Court discussed the standard of review:

> Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a

> finding of fact binding on a federal court to the extent stated by 28 U.S.C. §2254(d). . . .Although state court findings of fact made in a course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

The Strickland opinion made no distinction as to whether the district court's findings of fact were based on the state court record evidence or evidence produced independently in the federal habeas proceeding. However, the Strickland opinion also noted that the U.S. District Court conducted an evidentiary hearing regarding Washington's claims of ineffective assistance of counsel, but concluded that the state courts acted correctly in determining that the ineffectiveness claim did not merit an evidentiary hearing. 466 U.S. at 700-701.

In Anderson v. Bessemer City, 470 U.S. 564 (1985), this Court held that the Fourth Circuit erred in concluding that the findings of fact made by the U.S. District were clearly erroneous regarding the District Court's finding of discriminatory intent for a civil rights action. The Court noted

that the function of an appellate court is not to decide factual issues *de novo*. The Court held that the fact that the district court based its findings on documentary evidence rather than live testimony did not create an exception to Rule 52(a) of the Federal Rules of Civil Procedure.

D. The Opinion of the U.S. Court of Appeals for the Sixth Circuit in this case is fundamentally flawed by determining facts *de novo* from the state court record and by *sub silentio* rejecting findings of fact by the state courts and U.S. District Court.

In ruling that Gall's habeas corpus petition should be dismissed with prejudice, the U.S. District Court discussed in detail the evidence presented to the state trial court regarding Gall's mental state, both as to insanity and as to extreme emotional disturbance. (Opinion, Part II.E. and III.B. and C., Apx. 153-162, 171-177).

To the extent that the discussion by the U.S. District Court contains factual determinations, none of those determinations were discussed by the Sixth Circuit panel majority in concluding that Gall was entitled to a directed verdict of acquittal regarding the issue of extreme emotional disturbance. The majority's opinion also erred in concluding that under

Kentucky law at the time of the murder of Lisa Jansen by Gall, Kentucky law deemed insanity evidence the same thing as extreme emotional disturbance. (231 F.3d at 338-347 (Guy, J., dissenting in part), Apx. 112-126; Gall v. Commonwealth, 607 S.W.2d at 107-110, Apx. 250-257). *Cf.* Lewis v. Jeffers, 497 U.S. 764 at 780-784 (1990).

Finally, in ruling that the testimony by lay persons regarding Gall's mental or emotional state at the time shortly after he killed Lisa Jansen must be ignored in determining sufficiency of the evidence, the panel majority ignored an earlier Sixth Circuit ruling that state evidentiary law must be taken into account. Scott v. Pernini, 662 F.2d 428 at 432 (6th Cir. 1981), citing, Moore v. Duckworth, 443 U.S. 713 (1979).

II. THE SIXTH CIRCUIT IMPROPERLY APPLIED JACKSON V. VIRGINIA, 443 U.S. 307 (1979), AND THE PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. §2254, AND IMPROPERLY REJECTED THE KENTUCKY SUPREME COURT'S RULING ON STATE LAW AND FINDING THAT GALL'S INSANITY EVIDENCE DID NOT AMOUNT TO PROOF OF EXTREME EMOTIONAL DISTURBANCE.

The majority of the panel of the Sixth Circuit concluded that the Commonwealth of Kentucky did not meet its burden of proof for the crime of murder because the prosecution failed to prove the absence of extreme emotional disturbance, an element of murder under KRS 507.020(1)(a). (231 F.3d 265 at 286-306; Apx 18-56). The Sixth Circuit panel did point out, however, that there was little doubt that Gall killed and raped Lisa Jansen. (231 F.3d at 277; Apx. 2). The Kentucky Supreme Court unanimously rejected Gall's claim after reviewing the trial evidence, concluded the only evidence that Gall presented was that of mental illness or chronic paranoid schizophrenia, and held that Gall's mental illness evidence did not establish extreme emotional disturbance as defined by Kentucky law. Gall, 607 S.W.2d at 107-109 (Apx. 251-256).

The Sixth Circuit dissenting opinion reviewed the evidence and Kentucky cases relied on by Gall and the panel

majority and concluded that Gall's evidence did not compel the jury to conclude that Gall was suffering from an extreme emotional disturbance at the time of the murder or preclude the jury from concluding that Gall was not suffering from extreme emotional disturbance beyond a reasonable doubt at the time of the murder. (231 F.3d at 336-344; Apx. 112-126). Jackson v. Virginia, 443 U.S. at 319, explained the standard for reviewing a claim of insufficiency:

> Instead, the relevant question is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion and upon judicial review *all of the evidence* is to be considered in a light most favorable to the prosecution. [Citations and footnotes omitted.]

In Schlup v. Delo, 513 U.S. 298 at 330 (1995), this Court explained the Jackson v. Virginia standard:

> The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether sufficient evidence which, if credited, could support the conviction.... First, under *Jackson*, the assessment of credibility of witnesses is generally beyond the scope of review.... Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*, the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion.

In Wright v. West, 505 U.S. 277 at 296 (1992), this Court reversed the ruling of the Fourth Circuit that the evidence was insufficient to sustain the conviction and held that the jury could rationally disbelieve West's testimony. The Court noted that the jury could discredit West's testimony by taking into account West's demeanor as a witness, "which neither the Court of Appeals nor we may review."

Moore v. Duckworth, 443 U.S. 713 (1979), rejected a challenge to insufficiency of evidence to sustain a conviction based upon Indiana law, which at the time required the State to prove sanity beyond a reasonable doubt, and held that the state could rely on the testimony of lay witnesses to carry its burden, even though the defense relied on testimony by experts.

This Court has recognized that 28 U.S.C. §2254 established a presumption of correctness as to State court findings of fact, and that presumption requires a federal court to adhere to a State court finding, unless one of the statutory exceptions applies as set forth in the court's opinion. Sumner v. Mata, 449 U.S. 539 at 545-547 (1981); Marshall v. Lonberger, 459 U.S. 442 at 431-432 (1983); Parke v. Raley, 506 U.S. 20 at 35-36 (1992); Lewis v. Jeffers, 497 U.S. 764 at 780-784 (1990). Loveday v. Davis, 697 F.2d 135 (6th Cir. 1983), applied the presumption to an insufficiency claim.

This Court has also repeatedly held that federal habeas courts must generally defer to interpretations of State law made by the State Supreme Court and must take those interpretations into account in determining sufficiency of the evidence under Jackson. Lewis v. Jeffers, supra.

In addition to the Kentucky Supreme Court, the U.S. District Court also conducted *de novo* review of the record and found that the jury was not required to conclude from the evidence that Gall suffered from an extreme emotional disturbance. (Opinion, 11-18, 25-29; Apx. 153-162, 171-177). In this case, the majority of the Sixth Circuit conducted *de novo*

review of the evidence, rejecting the findings made by the Kentucky Supreme Court and U.S. District Court, and conducted *de novo* review in rejecting the Kentucky Supreme Court's interpretation of the Kentucky murder statute based upon the Kentucky court's own prior decisions explaining the requirements for proof of extreme emotional disturbance.

The Sixth Circuit compounded its error by relying upon cases decided prior to Jackson v. Virginia, *supra*, namely United States v. Smith, 437 F.2d 538 (6th Cir. 1970), and United States v. Burks, 547 F.2d 968 (6th Cir. 1977), both of which predate Jackson v. Virginia. Those cases clearly did not apply the Jackson standard, but more importantly were not habeas cases. In those cases the Sixth Circuit apparently independently assessed the evidence and conducted *de novo* review of the issues presented. The Sixth Circuit also erred in this case by rejecting testimony from the lay witnesses as to Gall's mental state near the time when the murder was committed, effectively deciding for itself that such testimony was not credible. The panel majority commingled the Kentucky law governing insanity, a defense on which it later acknowledged in the opinion that a defendant has the burden of proof, with the

Kentucky law on extreme emotional disturbance. Although Kentucky law requires a witness to have a factual basis or capability to assess an individual's mental state in testifying as to whether that individual was sane or insane or mentally ill, none of the Kentucky cases have ever imposed such a requirement for a layperson to testify regarding extreme emotional disturbance. *Cf.* Brown v. Commonwealth, 934 S.W.2d 242 (Ky. 1996), Wiseman v. Commonwealth, 587 S.W.2d 235 (Ky. 1979), and Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977).

Finally, the panel majority erred in concluding that a jury could not take into account circumstantial evidence regarding the murder, and the events preceding and following the act of murder in deciding on a defendant's state of mind, in order to conclude that the prosecution had proved its case beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 325; DeLisle v. Rivers, 161 F.3d 370 at 388-389 (6th Cir. 1998)(en banc).

III. THE SIXTH CIRCUIT PANEL OPINION IS ALSO ERRONEOUS IN FAILING TO APPLY THE PRESUMPTION OF CORRECTNESS REGARDING FACTUAL DETERMINATIONS BY THE STATE COURTS AND U.S. DISTRICT COURT ON ALLEGED FEDERAL CONSTITUTIONAL ERRORS.

A. The Sixth Circuit erred in rejecting the presumption of correctness regarding the exclusion of venireman Correll from the jury panel based on Correll's repeated statements that he was "undecided" regarding his ability to consider a death sentence.

Wainwright v. Witt, 469 U.S. 412 at 427-429, held that the presumption of correctness under 28 U.S.C. §2254(d) [prior to 1996 amendment] applied to a trial court's determination that a juror would be unable to thoroughly and impartially apply the law regarding capital punishment and should be excluded from the jury panel. Witt noted that there would be instances of jurors who would be unable to clearly articulate their position and that when such situations arose deference should be paid to the judgment of the trial court. 469 U.S. at 425-426, quoting *inter alia* from O'Bryan v. Estelle, 714 F.2d 365 at 379 (5th Cir. 1983). *Also see* Darden v. Wainwright, 477 U.S. 168 at 175-178 (1986). The Kentucky Supreme Court upheld the trial

court's decision to exclude Correll as a potential juror, quoting several portions of his testimony on voir dire. 607 S.W.2d at 103-104 (Apx. 240-243). Correll repeatedly indicated that he was "undecided" if his feelings would preclude him from imposing a death sentence. The Third Circuit applying the presumption of correctness under Wainwright v. Witt, *supra*, recently upheld the exclusion of a potential juror who, when asked about his ability to impose a death sentence, repeatedly responded, "I don't know." Riley v. Taylor, 237 F.3d 300 at 331-333 (3rd Cir. 2001), *en banc rehearing granted on other grounds*, 237 F.3d 348. *Also see* Castro v. Ward, 138 F.3d 810 at 824-825 (10th Cir. 1998). In Gall's case, as in the Witt case, neither Gall as pro se counsel nor his attorneys objected to the exclusion of venireman Carol from the jury panel. As noted in Wainwright v. Witt, 469 U.S. at 434-435, the absence of contemporaneous objection should be taken into account. The Sixth Circuit erred again by conducting *de novo* review and giving no deference to the finding made by the trial judge and Kentucky Supreme Court on this issue. (231 F.3d at 330-332; Apx. 99-102).

B. The Sixth Circuit's conclusion that the trial jury improperly considered Gall's parole eligibility was erroneously based upon *de novo* review, which ignored a state court finding to the contrary, and which relied upon evidence that was not presented to the state court without cause to excuse this procedural default.

On Gall's claim that the trial jurors improperly considered his parole eligibility during their deliberations, the state trial court conducted an evidentiary hearing and allowed at least one of the trial jurors to testify. Based on that juror's testimony, the state trial court concluded that the jury did not consider Gall's potential parole eligibility in imposing a death sentence. (State Court Record, 11.42 motion, TR 260; Sixth Circuit J.A., Volume 4, 1525.) However, the Sixth Circuit relied on testimony by another juror named Palmer who testified in federal district court. (231 F.3d at 335; Apx. 102-108). The Sixth Circuit failed to apply procedural default analysis as required by Keeney v. Tamayo-Reyes, 504 U.S. (1992), because this evidence was not presented to the state court at the state court hearing and further failed to apply the presumption of correctness under 28 U.S.C. §2254 to determine

whether this evidence was clear and convincing to overcome a state court's finding of fact.

The Sixth Circuit ignored rulings from other federal courts that the fact that a jury considers parole eligibility, is at most an error of state law rather than a federal constitutional error. Dobbs v. Zant, 963 F.2d 1403 at 1411 (11th Cir. 1991), revd. on other grds., 506 U.S. 357 (1993); Monroe v. Collins, 951 F.2d 49 (5th Cir. 1992); Ingram v. Zant, 26 F.3d 1047 at 1050-1053 (11th Cir. 1994). *Cf.* California v. Ramos, 463 U.S. 993 (1983); Romano v. Oklahoma, 512 U.S. 1 at 10-13 (1994).

Moreover, as even the panel majority acknowledged, the trial jury heard testimony that Gall had been repeatedly incarcerated and released (TE XIV 2079, XV 2117-2123) and that he had prior convictions. Thus, jury consideration of this information could not have been prejudicial. Finally even if one were to credit Palmer's inconsistent testimony (Habeas TE 85-106) that during deliberations another juror may have informed about Gall being on parole, as the U.S. District Court ruled, this fact was not admissible under FRE 606(b). (Magistrate's Report, Apx. 217-218). Tanner v. United States, 483 U.S. 107 at 119-127 (1987); Silagy v. Peters, 905 F.2d 986

at 1008-1009 (7th Cir. 1990); United States v. Gonzales, 227 F.3d 520 (6th Cir. 2000). Moreover, any possible error was harmless. Calderon v. Coleman, 525 U.S. 141 (1998).

C. The Sixth Circuit erred by concluding that the prosecutor's guilt phase closing argument was a federal due process violation.

On direct appeal, the Kentucky Supreme Court reviewed the record and unanimously concluded that the prosecutor's conduct did not operate to deprive Gall of a fair trial, but specifically discussed only two aspects of Gall's complaint about the prosecutor's conduct during the guilt phase. 607 S.W.2d at 110-111. The U.S. District Court also held that the trial prosecutor's conduct did not amount to a federal due process violation that deprived Gall of a fair trial. (Magistrate's Report, 14; Opinion, 34-35, Apx. 219, 177-185). The Sixth Circuit opinion noted that neither Gall nor his trial attorneys objected to any of the alleged incidents of misconduct by the prosecutor or improper closing argument by the prosecutor, but reviewed those comments applying "plain error analysis". The Sixth Circuit majority concluded that the trial prosecutor's discussion of the insanity evidence and defense amounted to a federal due process violation. (231 F.3d at 311-316; Apx. 65-

73). The dissenting opinion concluded that the prosecutor's comments were either not a federal due process violation were at most harmless error taken in the context of the trial as a whole. (231 F.3d at 344-346; Apx. 127-129).

Six Kentucky Supreme Court Justices, two federal district judges and one federal circuit judge found that the trial prosecutor's comments and closing argument were reasonable in light of the evidence presented at trial or were, at most, harmless error that was not sufficient to deprive Gall of due process or a fundamentally fair trial. Again, the Sixth Circuit panel majority ignored findings of fact made by the State Supreme Court and U.S. District Court regarding the prosecutor's closing argument and failed to properly apply the due process standard set forth by this Court in Darden v. Wainwright, 477 U.S. 160 at 178-183 (1986).

D. The Sixth Circuit panel erred in concluding that Gall's complaint about the capital sentencing instructions, although procedurally defaulted, was exempt from procedural default because of ineffective assistance of counsel, since the Sixth Circuit also found that Gall waived any complaint of ineffective assistance of counsel when he elected to act as pro se co-counsel during the trial.

At the request of Gall's trial counsel, the penalty phase jury instructions directed the jury to make findings regarding the existence or non-existence of mitigating circumstances, and also permitted the jury to write in on the verdict form any additional mitigating circumstances that were not listed in the instructions. (TR III 367-368, 389-390). Neither Gall nor his defense counsel made any objection to the penalty phase instructions. (TE XV 2172-2183). In state court, Gall never alleged that the penalty phase instructions amounted to ineffective assistance of trial counsel. (State TR 11.42, I 2-9 and 91, II 132-136). Although the penalty phase instructions did not indicate to the jury whether they needed to be unanimous as to finding mitigating circumstances, the Sixth Circuit concluded that the trial court's general unanimity instruction implicitly required the jury to be unanimous on mitigating circumstances, that the instructions violated Mills v.

Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990), that the Mills-McKoy rule was not a new rule of constitutional law under Teague v. Lane, 489 U.S. 288 (1989), that the claim was procedurally defaulted, but the default could be excused on the ground of ineffective assistance of trial counsel. (231 F.3d at 320-330; Apx. 81-88).

Paradoxically, immediately before the section discussing the penalty phase instructions, the Sixth Circuit held that Gall waived all claims of ineffective assistance of counsel by electing to act as his own pro se co-counsel. (231 F.3d at 320; Apx. 81). In addition, the Gall panel cites to what is a dissenting opinion (Merritt, C.J.) regarding the *en banc* Sixth Circuit's opinion in Kordenbrock v. Scroggy, 919 F.2d 1091 at 1110-1111 (6th Cir. 1990) (*en banc*), which was rejected by a majority of the *en banc* Sixth Circuit in that case, at 919 F.2d at 1120-1121 (Part IV of Judge Kennedy's opinion approved by a majority of the court on the jury instruction issue). *Cf.* Coe v. Bell, 161 F.3d 320 at 338-340 (6th Cir. 1999); Scott v. Mitchell, 209 F.3d 854 at 873-877 (6th Cir. 2000).

In addition, the Sixth Circuit repeated the same error for which this Court previously reversed by considering a claim of

ineffective assistance of counsel that was not presented to the state courts and that was procedurally defaulted under Kentucky law barring successive collateral attack motions. Edwards v. Carpenter, 525 U.S. 446 (2000). The Sixth Circuit panel opinion noted with respect to another claim that Kentucky barred successive collateral attack motions unless the ground was unknown and could not have been discovered by the exercise of reasonable diligence in time to be presented to the Court when the motion was filed. (231 F.3d at 316, Apx. 73, citing, *inter alia*, Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1980)).

Moreover, since the penalty phase instruction required the jury to be unanimous as to the existence or non-existence of any particular mitigating circumstance, allowed the jury the discretion to find unlisted mitigating circumstances, did not require the jury to impose a death sentence even if they found no mitigating circumstances, and precluded the jury from imposing the death sentence in the absence of unanimous agreement upon the sentence, the jury instructions in Gall's case did not amount to a clear violation of the Mills-McKoy rule. See McKoy v. North Carolina, *supra*, 494 U.S. at 455,

fn.*(Kennedy, J. concurring in judgment). The Sixth Circuit conceded that the Mills v. Maryland case was decided after Gall's death sentence became final on direct appeal. Hence, the Sixth Circuit's ruling was contrary to the non-retroactivity doctrine of Teague v. Lane, *supra*. Finally, the Sixth Circuit panel failed to apply the harmless error analysis with respect to jury instruction errors required by Calderon v. Coleman, 525 U.S. 141 (1998).

E. The Sixth Circuit panel also erred in concluding that the Commonwealth's introduction of a deposition by Dr. Chutkow, regarding Gall's mental state, violated the Confrontation Clause, because it amounted to a fundamental miscarriage of justice, even though the claim was procedurally defaulted for failure to present it to the Kentucky courts.

The Sixth Circuit majority concluded that Dr. Chutkow's deposition was a violation of the Confrontation Clause and exempt from procedural default. (231 F.3d at 316-319; Apx. 73-81). In respect to Dr. Chutkow's video-taped deposition, Gall's defense counsel specifically told the Court that if the Commonwealth did not introduce the deposition, he would. (TE XIII, 1933, 1938). Prohibiting the use of a videotaped deposition when defense counsel has stated he wishes the

deposition to be presented to the jury certainly amounts to a novel interpretation of federal law. The dissenting opinion points out the flaws in the analysis of the panel majority. (231 F.3d at 346-347; Apx. 129-131).

The Sixth Circuit's conclusion that this amounted to a fundamental miscarriage of justice is erroneous as a matter of fact and as a matter of law. "It is important to note in this regard that 'actual innocence' [regarding the fundamental miscarriage of justice exception to procedural default] means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614 at 623 (1998). "To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 338 at 559 (1999), quoting Schlup v. Delo, 513 U.S. 298 at 324 (1995). The Sixth Circuit panel *sub silentio* ignored the finding of fact made by the U.S. District Court regarding Gall's claim of legal insanity in finding fundamental miscarriage of justice regarding the admission of Dr. Chutkow's deposition. (Apx. 153-177).

By ignoring the findings of fact made by the U.S. District Court, the state trial court, and the Kentucky Supreme

Court, and by ignoring the interpretations of state law issued by the Kentucky Supreme Court, the Sixth Circuit majority opinion in this case is fundamentally flawed. This Court has the responsibility for establishing a uniform national standard of review regarding findings of fact made by the District Courts, even when relying upon state court record evidence, when those determinations are appealed to the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Attorney General of the Commonwealth of Kentucky requests that this Court grant a Petition for Writ of Certiorari to the Court of Appeals.

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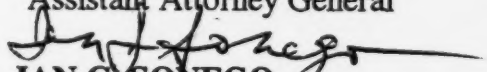

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